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CALIFORNIA SPORTFISHING PROTECTION
ALLIANCE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE,

Plaintiff,
v.

KATHLEEN ALLISON, in her official
capacity as Secretary of the
California Department of
Corrections and Rehabilitation,

Defendant.

COUNTY OF AMADOR, a public agency
of the State of California

Plaintiff,
v.

KATHLEEN ALLISON in her official
capacity as Secretary of the
California Department of
Corrections and Rehabilitation;
PATRICK COVELLO in his official
capacity of Warden of California
Department of Corrections and
Rehabilitation Mule Creek State
Prison,

Defendants.

Case No.: 2:20-cv-02482-WBS-AC

**PLAINTIFF CALIFORNIA
SPORTFISHING PROTECTION
ALLIANCE'S RESPONSE TO
DEFENDANTS' SEPARATE STATEMENT
OF UNDISPUTED FACTS IN SUPPORT
OF OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Date: January 9, 2023
Time: 1:30 p.m.
Courtroom: 5 (Hon. William B.
Shubb)

Action Filed: December 15,
2020 (*Consolidated with Case No.*
2:21-cv-00038-WBS-AC)

Pre-Trial Conf: February 13, 2023
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Attorneys for Plaintiff
CALIFORNIA SPORTFISHING PROTECTION
ALLIANCE

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 260(a), Plaintiff California Sportfishing Protection Alliance ("CSPA") submits its Responses to Defendants' Separate Statement of Undisputed Facts in support of CSPA's Opposition to Defendants' Motion for Summary Judgment, together with references to supporting material facts and cites to supporting evidence.

FACTS ASSERTED BY DEFENDANTS	SUPPORTING EVIDENCE	CSPA'S RESPONSES
1. Mule Creek State Prison ("MCSP") covers approximately 866 acres. The Facility houses approximately 3,800 inmates, employs approximately 1,400 staff, and provides job training and work opportunities for prison inmates.	Declaration of Anthony Orta filed concurrently ("Orta Decl."), at ¶ 3.	1. Undisputed.
2. Industrial activities that take place at the Facility include sewing/textile manufacturing, coffee roasting, and meat packing.	Orta Decl., at ¶ 15.	2. Undisputed.
3. The surrounding areas of the Facility, including areas near the stormwater conveyance system and Mule Creek, are frequented by wildlife, including birds	Orta Decl., at ¶ 3.	3. Undisputed but immaterial.

1	and deer. There		
2	are also cattle		
3	ranches located		
4	near Mule Creek		
	upstream of the		
	Facility.		
5	4. The Facility is	Declaration of	4. Undisputed.
6	permitted via the	Timothy Simpson	
7	following three	filed concurrently	
8	permits: (1) the	("Simpson Decl."),	
9	State Water	at ¶¶ 11, 16;	
10	Resource Control	State Water Resource	
11	Board's Permit for	Control Board's	
12	Waste Discharge	Permit for Waste	
13	Requirements for	Discharge	
14	Storm Water	Requirements for	
15	Discharges from	Storm Water	
16	Small Municipal	Discharges from	
17	Separate Storm	Small Municipal	
18	Sewer Systems	Separate Storm Sewer	
19	("MS4"), Order	Systems ("MS4"),	
20	2013-0001-DWQ (the	Order 2013-0001-DWQ	
21	"Small MS4	(the "Small MS4	
22	Permit"); (2) the	Permit"),	
23	State Board's	Defendants' Request	
24	General Permit for	for Judicial Notice	
25	Storm Water	("RJN"), Ex. A;	
26	Discharges	Orta Decl., at ¶¶ 2,	
27	Associated with	6;	
28	Industrial	Central Valley	
	Activities, Order	Regional Water	
	2014-0057-DWQ, as	Quality Control Board	
	amended (the	Inspection Report	
	"Industrial	("Inspection	
	General Permit");	Report"), dated	
	and (3) the	February 11, 2021,	
	Central Valley	RJN, Ex. F, at p. 1;	
	Water Board's	Waste Discharge	
	Waste Discharge	Requirements for	
	Requirements Order	California Department	
	R5-2015-0129 for	of Corrections and	
	MCSP's Wastewater	Rehabilitation Mule	
	Treatment Plant	Creek State Prison	
	("WWTP Permit")	Wastewater Treatment	
	that authorizes	Plant ("WWTP	
	CDCR to operate	Permit"), RJN, Ex. E.	
	the LAA.		

1 2 3 4 5 6 7 8 9	5. CDCR was designated a Small MS4 permittee under the Small MS4 Permit in 2019.	Designation of Mule Creek State Prison as Small MS4 Permittee under the Small MS4 General Permit, State Water Resources Control Board Order WQ 2019-0009-EXEC Amending Water Quality Order 2013-0001- DWQ, NPDES No. CAS00004, dated April 24, 2019, ("Small MS4 Designation"), RJN Ex. I, at p. 2; Simpson Decl., at ¶ 11.	5. Undisputed.
10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	6. A MS4 is a conveyance or system of conveyances used to manage stormwater that is owned and operated by a public entity.	Small MS4 Permit, RJN, Ex. A, at ¶ 14.	6. Disputed. Defendants' paraphrasing of paragraph 14 of the Small MS4 permit omits key features of a MS4, including that MS4s discharge to waters of the United States. The full text is as follows: A MS4 is a conveyance or system of conveyances that is: 1) owned by a state, city, town, village, or other public entity that discharges to waters of the United States; 2) designed or used to collect or convey storm water (including storm drains, pipes, ditches, etc.); 3) not a combined sewer; and 4) not part of a Publicly Owned Treatment Works or sewage treatment plant. Small MS4 Permit, ¶ 14.

1	7. The Small MS4 Permit states:	Small MS4 Permit, RJN, Ex. A, at ¶ 36.	7. Undisputed.
2	Consistent with the		Immaterial to CSPA's
3	Clean Water Act		claims.
4	section		
5	402(p) (3) (B) (iii),		
6	this Order requires		
7	controls to reduce		
8	pollutants from the		
9	MS4 to the maximum		
10	extent practicable		
11	(MEP). The MEP		
12	standard requires		
13	Permittees to apply		
14	Best Management		
15	Practices (BMPs)		
16	that are effective		
17	in reducing or		
18	eliminating the		
19	discharge of		
20	pollutants to the		
21	waters of the U.S.		
22	MEP emphasizes		
23	pollutant reduction		
24	and source control		
25	BMPs to prevent		
26	pollutants from		
27	entering storm water		
28	runoff. MEP may		
	require treatment of		
	the storm water		
	runoff if it		
	contains pollutants.		
	The MEP standard is		
	an ever-evolving,		
	flexible, and		
	advancing concept,		
	which considers		
	technical and		
	economic		
	feasibility. BMP		
	development is a		
	dynamic process and		
	may require changes		
	over time as the		
	Permittees gain		
	experience and/or		
	the state of the		

1 science and art 2 progresses. To do 3 this, the Permittees 4 must conduct and 5 document evaluation 6 and assessment of 7 each relevant 8 element of its 9 program, and their 10 program as a whole, 11 and revise 12 activities, control 13 measures/BMPs, and 14 measurable goals, as 15 necessary to meet 16 MEP. MEP is the 17 cumulative result of 18 implementing, 19 evaluating, and 20 creating 21 corresponding 22 changes to a variety 23 of technically 24 appropriate and 25 economically 26 feasible BMPs, 27 ensuring that the 28 most appropriate BMPs are implemented in the most effective manner.		
8. CDCR submitted a No Exposure Certification ("NEC") with the Water Board in 2018.	No Exposure Certification ("NEC") to enroll the Facility under the NPDES General Permit Storm Water Discharges Associated with Industrial Activities, WQ Order No. 2014-9957-DWQ, certified May 8, 2018, RJN, Ex. H.	8. Undisputed. Immaterial to CSPA's claims.

1 2 3 4 5 6 7	9. An NEC acts as an exemption to the Industrial General Permit requirements, such that compliance with the NEC is deemed compliance with the Industrial General Permit.	Inspection Report, RJN, Ex. F, at p. 1.	9. Undisputed. Immaterial to CSPA's claims.
8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	10. The Regional Board inspected the Facility on January 27, 2021, and found no violations, concluding that the NEC-covered areas complied with applicable requirements. The Regional Board also noted that "the interior rooms were clean and orderly, and no potential sources of stormwater pollution were observed at the loading docks, or around storm drains; waste bins were covered and in good condition."	Inspection Report, RJN, Ex. F, at p. 4.	10. Undisputed. Immaterial to CSPA's claims.

11. The Regional Water Board permitted CDCR's use of LAAs for the discharge of treated wastewater from the WWTP under Waste Discharge Requirements Order R5-2015-0129 ("WWTP Permit"), adopted on December 11, 2015.	WWTP Permit, RJN, Ex. E, at ¶ 62.	11. Undisputed. The WWTP Permit authorizes the discharge of treated wastewater to land application areas, but the WWTP Permit prohibits discharges to surface waters (i.e., Mule Creek). ECF No. 95-8 at 34.
12. At MCSP, prior to spray application, wastewater is treated in an oxidation ditch and clarifiers, then disinfected in the chlorine contact pipe. The secondary disinfected effluent is then discharged to LAAs via spray irrigation where it is applied to the land surface.	WWTP Permit, RJN, Ex. E, at p. 44; Simpson Decl., at ¶ 16; Orta Decl., at ¶ 10.	12. Undisputed but immaterial.
13. The Facility operates a stormwater collection system that employs best management practices ("BMPs"), as approved by the Central Valley	Orta Decl., at ¶¶ 4-13; Simpson Decl., at ¶ 15.	13. Disputed. Defendants' assertion is not a fact, but a legal interpretation of the Small MS4 Permit. The interpretation of an NPDES permit is a question of law. <i>NRDC v. Cnty of Los</i>

<p>1 Regional Water 2 Quality Control 3 Board.</p>		<p>Angeles, 725 F.3d 1194, 1204 (9th Cir. 2013).</p> <p>The Central Valley Regional Water Quality Control Board ("Regional Board") does not "approve" any management practices.</p> <p>Further, Defendants have not implemented BMPs to adequately address the pollutants in their stormwater discharges, such as <i>E. coli</i> and metals, or to effectively prohibit non- stormwater discharges. Maharg Decl., Ex. 1 at tbls. 2-11; Maharg Decl., Ex. 2 (Orta Tr.) at 97:19-98:7, 112:17- 22, 113:2-10, 107:18- 108:9, 110:6-16; Ex. 25 at MCSP4560; ECF No. 95-3 at 72; ECF No. 95-4 at 19.</p> <p>On November 3, 2022, the Regional Board notified Defendants that they had not implemented BMPs sufficient to address metals that are causing or contributing to WQS exceedances in Mule Creek. Maharg Decl., Ex. 21.</p>
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1	14. The stormwater	Orta Decl., at ¶¶ 4,	14. Disputed.
2	system consists	7, 8, 19, 20;	Defendants' own
3	of a network of	Simpson Decl., at ¶¶	stormwater sampling
4	conveyances,	25, 26.	data demonstrates
5	culverts,		that the stormwater
6	outfalls, and		system does not
7	"bioswales" that		"sett[e] out and
8	allow for		filter contaminants
9	settling out and		from stormwater
10	filter		before it reaches
11	contaminants		nearby Mule Creek."
12	from stormwater		Maharg Decl., Ex. 1
13	before it		at tbls. 2-6 (samples
14	reaches nearby		taken at MCSP2 and
15	Mule Creek.		MCSP3, after the
16			bioswales) Discharges
17			measured at MCSP2 and
18			MCSP3 exceeded WQS
19			for <i>E. coli</i> and
20			metals. Maharg Decl.,
21			Ex. 1 at ¶¶ 10-13,
22			14-15, tbls. 2-6.
23			The bioswales have
24			been in place before
25			the Facility was
26			covered under the
27			Small MS4 Permit, and
28			Defendants have not
			made any changes to
			them. Maharg Decl.,
			Ex. 2 (Orta Tr.) at
			97:19-24.
			Defendants have
			presented no evidence
			to show that the
			stormwater system
			"allow[s] for
			settling out"
			bacteriological
			pollutants, dissolved
			metals, or
			pharmaceuticals from
			their stormwater
			discharges to Mule
			Creek.
			Defendants have
			presented no evidence
			to show that the
			stormwater system
			"filter[s]"
			bacteriological
			pollutants, dissolved

1		metals, or
2		pharmaceuticals from
3		their stormwater
4		discharges to Mule
5		Creek.
6		Defendants do not
7		know how the
8		bioswales were
9		designed or if the
10		bioswales are
11		intended to reduce
12		pollutants. Maharg
13		Decl., Ex. 2 (Orta
14		Tr.) at 97:25-98:7,
15		113:2-10.
16		Defendants' sampling
17		shows that pollutant
18		concentrations may
19		increase after the
20		bioswale. ECF 95-5 at
21		116-117.
22	15. In implementing	15. Disputed.
23	the BMPs, CDCR	Defendants' assertion
24	has worked	is not a fact, but a
25	closely with the	legal interpretation
26	Water Board's	of the Small MS4
27	permitting staff	Permit. The
28	and is engaged	interpretation of an
	in an iterative	NPDES permit is a
	process to	question of law. <i>NRDC</i>
	further improve	<i>v. Cnty of Los</i>
	the quality of	<i>Angeles</i> , 725 F.3d
	the Facility's	1194, 1204 (9th Cir.
	stormwater	2013).
	discharges.	Disputed that CDCR
		has improved the
		quality of the
		Facility's stormwater
		discharges. Maharg
		Decl., Ex. 1 at Tbls.
		2-6, 8-1.
		The majority of the
		BMPs in place at the
		Facility were in
		place for years.
		Maharg Decl., Ex. 2

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		<p>(Orta Tr.) at 97:19-24, 112:17-24, 107:18-24, 107:25-108:9, 110:6-16; ECF No. 95-4 at 19.</p> <p>Defendants have not fixed defects in their sanitary sewer system and MS4 that were identified in 2019. Maharg Decl., Ex. 2 (Orta Tr.) at 114:6-13; Maharg Decl., Ex. 20 at MCSP31322; Ex. 26.</p> <p>Defendants have admitted to continuing unlawful discharges of irrigation waters and conceded that the Facility would not come into compliance with Provision B.3 with regard to their irrigation discharges, until February 2025. ECF No. 95-4 (Orta Decl.) at 19; Maharg Decl., Ex. 23 at MCSP33473; Maharg Decl., Ex. 7 at MCSP32215-16.</p> <p>On November 3, 2022, the Regional Board notified Defendants they have not complied with orders to address discharges that cause or contribute to exceedances of metals in Mule Creek. Maharg Decl., Ex. 21.</p>
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16. Stormwater runoff at the Facility collects in a conveyance ditch paralleling a lethal electrified fence surrounding the Facility, with the ditch leading to two culverts located at sampling locations designated as "MCSP5" and "MCSP6."	Orta Decl., at ¶ 4; Excerpt from Revised Stormwater Collection System Investigation Report of Findings, revised June 2020, prepared by SHN Engineers & Geologists for California Department of Corrections and Rehabilitation, ("2020 Collection System Investigation Report"), Declaration of Alanna Lungren ("Lungren Decl."), Ex. B, at p. 7.	16. Undisputed.
17. Stormwater passes through the culverts at MSCP5 and MCSP6 where it is periodically sampled.	Orta Decl., at ¶ 4.	17. Undisputed.
18. During most of the year (i.e., during dry weather and light rain), culvert "slide gates" block the flow and both stormwater and non-stormwater are directed to the Facility's permitted WWTP where the water is treated with secondary level treatment.	Orta Decl., at ¶ 4; 2020 Collection System Investigation Report, Lungren Decl., Ex. B, at p. 8.	18. Disputed. Not all stormwater and non-stormwater in the MS4 is pumped to the WWTP. Maharg Decl., Ex. 1 at ¶ 24 (Ashby Declaration documenting standing water in MS4 during dry weather conditions), ¶ 25 (observations of flows to Mule Creek in dry weather conditions); Maharg Decl., Ex. 29 (Emerick Expert Rpt.) at 11-16. The slide gates are not water-tight and do not block all

		flow when they are closed. Maharg Decl., Ex. 2 (Orta Tr.) at 121:16-22.
19. The secondary treatment at the WWTP consists of two bar screenings, an oxidation ditch, two parallel clarifiers, a chlorine contact pipe, a sludge belt press, sludge drying beds, and effluent storage reservoir, and spraying of the treated material on LAA.	WWTP Permit, RJN, Ex. E, at ¶ 11; County of Amador's First Amended Complaint for Declaratory and Injunctive Relief (ECF 35, "County's FAC"), ¶¶ 59-60; Orta Decl., at ¶ 4.	19. Undisputed but immaterial.
20. During periods of heavy rain, deemed "Significant Rain Events," the slide gates are opened to allow stormwater to pass through MCSP5 and MCSP6 due to capacity limits at the WWTP.	Orta Decl., at ¶ 4; 2020 Collection System Investigation Report, Lungren Decl., Ex. B, at p. 8-9.	20. Undisputed.
21. When stormwater passes through the culverts at MCSP5 and MCSP6, it flows into the vegetated bioswale channels before reaching the two outfalls at monitoring locations MCSP2 and MCSP3.	2020 Collection System Investigation Report, Lungren Decl., Ex. B, at p. 14; Orta Decl., at ¶ 4.	21. Undisputed.

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2	22. From monitoring location MCSP6, the bioswale channel extends approximately 1,500 feet to the outfall at MCSP3.	Orta Decl., at ¶¶ 4, 20; 2020 Collection System Investigation Report, Lungren Decl., Ex. B, at p. 14.	22. Undisputed.
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7	23. From monitoring location MCSP5, the bioswale channel extends approximately 630 feet to the outfall at MCSP2.	Orta Decl., at ¶¶ 4, 19; 2020 Collection System Investigation Report, Lungren Decl., Ex. B, at p. 14.	23. Undisputed.
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12	24. If there is sufficient flow, stormwater is then discharged from the outfalls at MCSP2 and MCSP3 into Mule Creek.	Orta Decl., at ¶ 4.	24. Undisputed. Defendants have self-reported discharges from their MS4 to Mule Creek on numerous occasions since January 2021. Maharg Decl., Exs. 8-20.
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17	25. The Small MS4 Permit does not require sampling and monitoring of CDCR's stormwater discharges.	Small MS4 Permit, RJN, Ex. A, passim; Simpson Decl., at ¶ 12.	25. Undisputed but immaterial.
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21	26. The Regional Water Board issued a section 13383 Order requiring CDCR to submit periodic monitoring reports to the Board.	Water Code section 13383 Order to Monitor Discharges to Surface Water dated November 29, 2021 ("13383 Order 2021"), Simpson Decl., Ex. A.	26. Undisputed. The Regional Board issued the first 13383 Order requiring CDCR to conduct outfall and receiving water sampling and report the results to the Regional Board on August 20, 2020. Maharg Decl., Ex. 6. The Regional Board
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		revised the 13383 Order in December 2020. Maharg Decl., Ex. 7. The Regional Board again revised the 13383 Order on November 29, 2021. ECF No. 95-5 at 15-28
27. The location denoted as "MCSP4" is collected directly from Mule Creek.	Orta Decl., at ¶ 4.	27. Undisputed.
28. As a permittee under the Small MS4 Permit since 2019, CDCR has been engaged in an iterative process with the Water Board to monitor and improve its Small MS4 Permit program to comply with the Permit.	Simpson Decl., at ¶ 11; Orta Decl., at ¶¶ 5-13.	<p>28. Disputed and immaterial.</p> <p>Defendants' assertion is not a fact, but a legal interpretation of the Small MS4 Permit.</p> <p>Disputed that CDCR has improved its Small MS4 Permit Program to comply with the Permit or improve the water quality of its discharges. Maharg Decl., Ex. 1 at Tbls. 2-6, 8-1.</p> <p>The majority of the BMPs in place at the Facility were in place for years. Maharg Decl., Ex. 2 (Orta Tr.) at 97:19-24, 112:17-24, 107:18-24, 107:25-108:9, 110:6-16; ECF No. 95-4 at 19.</p> <p>Defendants have not fixed defects in their sanitary sewer system and MS4 that were identified in 2019. Maharg Decl., Ex. 2 (Orta Tr.) at</p>

		<p>114:6-13; Maharg Decl., Ex. 20 at MCSP31322; Ex. 26.</p> <p>Defendants have admitted to continuing unlawful discharges of irrigation waters and conceded that the Facility would not come into compliance with Provision B.3 with regard to their irrigation discharges, until February 2025. ECF No. 95-4 (Orta Decl.) at 19; Maharg Decl., Ex. 23 at MCSP33473; Maharg Decl., Ex. 7 at MCSP32215-16.</p> <p>On November 3, 2022, the Regional Board notified Defendants they have not complied with orders to address discharges that cause or contribute to exceedances of metals in Mule Creek. Maharg Decl., Ex. 21.</p>
<p>29. One way in which this dynamic process of BMP development occurs is through the Small MS4 Permit's Annual Reporting that documents and assesses the Small MS4 Permit program elements.</p>	<p>Small MS4 Permit, RJN, Ex. A, section E.16; Simpson Decl., at ¶ 15.</p>	<p>29. Disputed and immaterial.</p> <p>Defendants' assertion is not a fact, but a legal interpretation of the Small MS4 Permit.</p>

1	30. The Small MS4	Small MS4 Permit,	30. Undisputed
2	Permit requires that	RJN, Ex. A, Provision	but immaterial.
3	CDCR:	E.14.b., at p. 76;	
4	"identify and make	Simpson Decl., at ¶¶	
5	modifications to	13, 14.	
6	BMPs, including		
7	new BMPs or		
8	modification to		
9	existing BMPs,		
10	to improve		
11	effectiveness in		
12	each priority		
13	area. The		
14	Permittee shall		
15	consult with the		
16	applicable		
17	Regional Water		
18	Board in setting		
19	expectations for		
20	the scope,		
21	timing, and		
22	frequency of BMP		
23	modifications."		
24			
25	31. The Water Board	Orta Decl., at ¶ 6;	31. Disputed
26	reviews CDCR's	Simpson Decl., at ¶	and immaterial.
27	submittals regarding	15.	
28	its program		While the Regional
	effectiveness and		Board has provided
	provides feedback,		feedback to Defendants
	which includes		with regards to
	discussion on what		certain aspects of
	BMPs and controls		their MS4 program,
	CDCR has implemented		there is no evidence
	or is in the process		that the Regional
	of implementing to		Board has done a
	comply with the Small		comprehensive review
	MS4 Permit.		of Defendants'
			compliance with the
			Small MS4 Permit and
			provided feedback on
			all aspects of its
			compliance.
			On November 3, 2022,
			the Regional Board
			notified Defendants
			they have not complied
			with orders to address

1		discharges that cause or contribute to exceedances of metals in Mule Creek. Maharg Decl., Ex. 21.
2		Engagement in the iterative process does not excuse violations or exempt Defendants from enforcement. ECF No. 95-7 at 422; <i>NRDC v. Cnty of LA</i> , 673 F.3d 880, 897 (9th Cir. 2011)
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11	32. Through the iterative process for compliance with the Permit, MCSP has developed and implemented various BMP measures at the Facility.	Orta Decl., at ¶¶ 4, 6-13; Simpson Decl., at ¶ 15.
12		32. Disputed and immaterial. Defendants' assertion is not a fact, but a legal interpretation of the Small MS4 Permit.
13		Disputed that CDCR has improved its Small MS4 Permit Program to comply with the Permit or improve the water quality of its discharges. Maharg Decl., Ex. 1 at Tbls. 2-6, 8-1.
14		The majority of the BMPs in place at the Facility were in place for years. Maharg Decl., Ex. 2 (Orta Tr.) at 97:19-24, 112:17-24, 107:18-24, 107:25-108:9, 110:6-16; ECF No. 95-4 at 19.
15		Defendants have not fixed defects in their sanitary sewer system and MS4 that were identified in
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1		2019. Maharg Decl., Ex. 2 (Orta Tr.) at 114:6-13; Maharg Decl., Ex. 20 at MCSP31322; Ex. 26.
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4		Defendants have admitted to continuing unlawful discharges of irrigation waters and conceded that the Facility would not come into compliance with Provision B.3 with regard to their irrigation discharges, until February 2025. ECF No. 95-4 (Orta Decl.) at 19; Maharg Decl., Ex. 23 at MCSP33473; Maharg Decl., Ex. 7 at MCSP32215-16.
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14		On November 3, 2022, the Regional Board notified Defendants they have not complied with orders to address discharges that cause or contribute to exceedances of metals in Mule Creek. Maharg Decl., Ex. 21.
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20		The only new BMP that Defendants have installed at the Facility after this action as initiated is the installation of monitoring structures at MCSP2 and MCSP3, which do not actually reduce pollutants in discharges but only measure the flow. ECF No. 96-4 at 18; Maharg Decl., Ex. 3 (Larabee Tr.) at 77:11-15.
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1	33. The BMPs include	Orta Decl., at ¶ 8.	33. Undisputed
2	informational		but immaterial.
3	memoranda from the		
4	Warden to the MCSP		
5	staff regarding the		
6	stormwater prevention		
7	program, including		
8	such topics as the		
9	handling of trash to		
10	prevent it from		
11	entering the		
12	stormwater collection		
13	system,		
14	administrative		
15	controls, landscape		
16	training and		
17	rescheduling for		
18	irrigation runoff		
19	reduction, and		
20	physical control		
21	measures at		
22	designated areas of		
23	the stormwater		
24	collection system.		
25	34. BMPs implemented	Orta Decl., at ¶ 8.	34. Disputed.
26	at storm drains		Wash waters were
27	around the Facility		observed discharging
28	include fabric,		to storm water system
	wattles, designed v-		during Plaintiffs'
	ditches to catch		site inspection.
	sediment from runoff,		Maharg Decl., Ex. 29
	and paved aprons to		(Emerick Expert Rpt.)
	filter or reduce		at 11.
	contaminants in		
	discharges. In		Disputed that "paved
	addition, wash water		aprons" filter or
	at work areas or for		reduce certain
	washing vehicles is		contaminants, such as
	drained to the		bacteria, dissolved
	sanitary sewer rather		metals, and
	than the stormwater		pharmaceuticals in
	collection system or		discharges. Maharg
	it is conducted on		Decl., Ex. 2 (Orta
	unpaved areas where		Tr.) at 18:24-19:15,
	water percolates or		98:8-25; Maharg Decl.,
	evaporates before it		Ex. 1 at tbls. 8-11
	reaches the storm		(showing ongoing
	drains.		

		exceedances of WQS in Defendants' discharges); Maharg Ex. Decl., Ex. 29 (Emerick Expert Rpt.) at 11-12.
35. Other BMPs implemented include the installation of curbs that redirect non-stormwater flows to float-controlled pumps that pump non-stormwater flows to the WWTP where it receives secondary treatment.	Orta Decl., at ¶ 10; Mule Creek State Prison's Revised Non-Storm Water Discharge Elimination Plan, dated May 13, 2022, ("Revised Non-Storm Water Discharge Elimination Plan"), Orta Decl., Ex. B, sections (a)(1), (b), (c).	35. Disputed. Not all stormwater and non-stormwater in the MS4 is pumped to the WWTP, even during dry weather. Maharg Decl., Ex. 1 at ¶ 24 (Ashby Declaration documenting standing water in MS4 during dry weather conditions), ¶ 25 (observations of flows to Mule Creek in dry weather conditions); Maharg Decl., Ex. 29 (Emerick Expert Rpt.) at 11-16. The slide gates are not water-tight and do not block all flow when they are closed. Maharg Decl., Ex. 2 (Orta Tr.) at 121:16-22 During Significant Rain Events, non-stormwater is not redirected to the WWTP, but instead non-stormwater flows are co-mingled with stormwater flows, which discharge to Mule Creek when the gates are opened. ECF No. 95-4 (Orta Decl.), ¶ 4; ECF No. 95-3 at 69-70 (SHN Report, p. 8-9).

		See Fact 20, above.
<p>36. The Facility also curtails the irrigation schedule for all areas at the facility to minimize the potential for potable landscape irrigation runoff, and applies soil stabilization measurements when identified, along with sediment controls.</p>	<p>Orta Decl., at ¶ 10; Revised Non-Storm Water Discharge Elimination Plan, Orta Decl., Ex. B, sections (a) (1), (b), (c).</p>	<p>36. Disputed.</p> <p>The Revised Non-Storm Water Discharge Elimination Plan is not evidence of actually implemented BMPs.</p> <p>Defendants continue to report irrigation discharges to the MS4. See, e.g., Maharg Decl., Ex. 27 (2022 Q2 Monitoring Rpt.) at p. 3. Although Defendants have reported that they have not irrigated since July 1, 2021, Mr. Orta testified that this was not the case. Maharg Decl., Ex. 22 (Orta Tr.) at 163:18-165:13.</p> <p>Defendants have admitted to continuing unlawful discharges of irrigation waters and conceded that the Facility would not come into compliance with Provision B.3 with regard to their irrigation discharges, until February 2025. ECF No. 95-4 (Orta Decl.) at 19; Maharg Decl., Ex. 23 at MCSP33473; Maharg Decl., Ex. 7 at MCSP32215-16.</p>

1	37. MCSP staff are	Orta Decl., at ¶ 11.	37. Undisputed
2	trained on and		but immaterial.
3	implement numerous		
4	BMPs such as street		
5	sweeping, material		
6	handling and storage,		
7	waste management,		
8	stockpile management,		
9	management of washout		
10	areas, vehicle and		
11	equipment cleaning,		
12	fueling, and		
13	maintenance, and		
14	spill prevention and		
15	control.		
16	38. Weekly	Orta Decl., at ¶ 12.	38. Undisputed
17	inspections and		but immaterial.
18	clean-ups are also		
19	carried out		
20	throughout the		
21	Facility, and		
22	preventative		
23	maintenance work		
24	orders are issued		
25	quarterly for storm		
26	water and sanitary		
27	sewer inspections and		
28	cleaning.		
1	39. CDCR recently	Orta Decl., at ¶ 9.	39. Undisputed.
2	completed a BMP		
3	project that consists		
4	of a permanent		
5	monitoring station at		
6	MCSP2 and MCSP3.		
7	40. MCSP is also	Orta Decl., at ¶ 13.	40. Undisputed.
8	implementing the		
9	Regional Board-		
10	approved Enhanced		
11	Compliance Action		
12	involving replacement		
13	of the entire		
14	landscape irrigation		
15	system at the		
16	Facility.		

1	41. CDCR conducted	Simpson Decl., at ¶¶	41. Undisputed
2	two major	20 - 22;	as to the existence
3	investigations of its	2020 Collection	of the
4	stormwater and	System Investigation	investigations.
5	wastewater systems in	Report, Lungren	Disputed to the
6	conjunction with the	Decl., Ex. B;	extent that "in
7	Regional Water	Excerpts from	conjunction with the
8	Board's permit	Quantification of	Regional Water
9	compliance staff.	Sources of Fecal	Board's permit
10		Pollution at Mule	compliance staff"
11		Creek, dated January	suggests that
12		2021, prepared by	Regional Board staff
13		Southern California	concurred with the
14		Coastal Water	conclusions of the
15		Research Project for	report. Regional
16		Central Valley	Board staff
17		Regional Water	specifically
18		Quality Control Board	disagreed with the
19		and the California	findings of the SHN
20		Department of	Report. Maharg
21		Correction and	Decl., Ex. 22 at
22		Rehabilitation ("2021	MCSP31320-25.
23		Sources Fecal	
24		Pollution Report"),	
25		Lungren Decl., Ex. A.	
26	42. From 2018 to	2020 Collection	42. Undisputed.
27	2022, an independent	System Investigation	
28	consultant conducted	Report, Lungren	
	an investigation of	Decl., Ex. B.	
	the stormwater and		
	wastewater collection		
	systems in close		
	consultation with the		
	Water Board		
	specifically to		
	determine if		
	wastewater commingled		
	with stormwater at		
	the Facility.		
	43. Phase I of the	2020 Collection	43. Undisputed.
	investigation	System Investigation	
	included: (1) the	Report, Lungren	
	collection and	Decl., Ex. B, at p.	
	laboratory sampling	ii.	
	of soil and water		
	samples from both		
	systems; (2) visual		

1	manhole and closed-		
2	circuit television		
3	(CCTV) inspections of		
4	both systems; (3) dye		
5	and smoke testing of		
6	the sewer system that		
7	could detect leaks,		
8	track any migration		
9	of material, and		
10	assess "connectivity		
11	of pipe systems"		
12	(Section 2.4.1); (4)		
13	daily sampling of		
14	stormwater within the		
15	collection system;		
16	(5) baseline soil and		
17	water sampling; and		
18	(6) identifying the		
19	source of fecal		
20	coliform results		
21	using		
22	deoxyribonucleic		
23	(DNA) microbial		
24	source tracking.		
25	44. During the	2020 Collection	44. Undisputed.
26	investigation, CDCR	System Investigation	
27	worked closely with	Report, Lungren	
28	the Water Board—which	Decl., Ex. B, at p.	
	collected its own	1.	
	"split" samples to		
	confirm CDCR's		
	results—and obtained		
	the Water Board's		
	approval of the		
	sampling plans. Upon		
	completion, Phase I		
	of the report was		
	provided to the Water		
	Board for its review		
	and approval.		
25	45. The results of	2020 Collection	45. Disputed.
26	the investigation are	System Investigation	
27	documented in a	Report, Lungren	
28	report entitled	Decl., Ex. B, section	
	Revised Storm Water	4.3.2., at p. 89.	
	Collection System		Defendants'
			investigation of the
			stormwater
			collection system
			and sanitary sewer

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	Investigation Findings Report, originally completed in 2018 and last updated on June 19, 2020 (the "2020 Collection System Investigation Report"). The 2020 Collection System Investigation Report concluded that: (1) there was no tracer dye observed in the stormwater system (Section 3.4.2.1); (2) there are no cross-connections between the stormwater and sewer systems (Section 5.0); (3) there was no evidence that the stormwater system was impacted by sewage, wastewater, or grey water; and, (4) there was no sewage discharging into Mule Creek.	systems found "hundreds" of defects in both systems. Maharg Decl., Ex. 22 at MCSP31308. Defendants' investigation also determined that sections of the sanitary sewer lines were located above stormwater sewer lines. Id. at MCSP 31306-07 While Defendants' report concludes that no <i>direct</i> cross connections exist, the finding does not extend to <i>indirect</i> cross connections via exfiltration and infiltration. Maharg Decl., Ex. 22 at MCSP31320-21 (Regional Board noting that Defendants' conclusion is not supported by evidence); Maharg Decl., Ex. 4 at MCSP32976 (EPA finding same); Maharg Decl., Ex. 33 (Larabee Tr.) at 117:22-118:19.
20 21 22 23 24 25 26 27 28	46. The Water Board and CDCR also worked closely with an independent public research and development agency, known as the Southern California Coastal Water Research Project ("SCCWRP") to further investigate the sources and scope of fecal matter in Mule Creek.	2021 Sources Fecal Pollution Report, Lungren Decl., Ex. A; Simpson Decl., at ¶¶ 20-21. 46. Undisputed.

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7	47. SCCWRP conducted	2021 Sources Fecal	47. Undisputed.
8	an extensive	Pollution Report,	
9	investigation	Lungren Decl., Ex. A,	
10	consisting of twenty-	at pp. ii.	
11	two (22) days of		
12	sampling, fourteen		
13	(14) of which were		
14	during or promptly		
15	after rain events,		
16	and collected		
17	numerous samples from		
18	Mule Creek both		
19	upstream and		
20	downstream of the		
21	Facility.		
22	48. SCCRWP's January	2021 Sources Fecal	48. Disputed.
23	2021 report entitled,	Pollution Report,	
24	"Quantification of	Lungren Decl., Ex. A,	Pharmaceuticals and
25	Sources of Fecal	at pp. ii.	personal care
26	Pollution at Mule		products were found
27	Creek," (the "2021		in samples taken
28	Sources of Fecal		from the MS4. Maharg
	Pollution Report")		Decl., Ex. 29
	demonstrates that		(Emerick Expert
	fecal bacteria		Report), at p. 17.
	detected in		CSPA's Expert, Dr.
	stormwater at MCSP is		Robert Emerick,
	almost entirely from		concluded that the
	animal sources (bird		"most likely source
	and deer) and not		of these bacterial
	from any appreciable		indicators "is from
	human sources.		the sanitary sewer
			system." <i>Id.</i> at p.
			18-19.
	49. It further	2021 Sources Fecal	49. Undisputed
	concluded that fecal	Pollution Report,	that the report
	bacteria levels in		draws this
			conclusion. Disputed

1	Mule Creek were often	Lungren Decl., Ex. A,	that these are the
2	higher upstream of	at pp. ii, 3, 14, 23.	only findings of
3	MCSP and that human		this report. The
4	fecal matter in		sampling conducted
5	stormwater was at		for the report also
6	negligible levels.		showed that in one-
7			third of the
8			samples, "the
9			concentration
10			increase moving past
11			the prison property
12			was sufficient to
13			cause a downstream
14			water quality
15			standard exceedance
16			where the upstream
17			sample was in
18			compliance. For the
19			remaining third,
20			there was an
21			increase moving
22			downstream, but no
23			difference in water
24			quality compliance
25			status between the
26			upstream and
27			downstream site."
28			ECF No. 95-3 at 8.
15	50. The 2021 Sources	2021 Sources Fecal	50. Disputed.
16	of Fecal Pollution	Pollution Report,	
17	Report demonstrated	Lungren Decl., Ex. A,	The fact that cows
18	that the overall	at pp. 1, 20, 22, 23.	or other sources
19	water quality		contribute E. coli
20	conditions of Mule		upstream to Mule
21	Creek were heavily		Creek upstream of
22	impacted by cows		the Facility is
23	(i.e.. cattle		immaterial. Further,
24	ranches) upstream of		the 2021 Sources of
25	MCSP and background		Fecal Pollution
26	sources (birds and		Report concluded
27	deer), rather than		that in one-third of
28	human fecal		the samples, "the
	contributions.		concentration
			increase moving past
			the prison property
			was sufficient to
			cause a downstream
			water quality
			standard exceedance
			where the upstream
			sample was in
			compliance. For the
			remaining third,
			there was an
			increase moving

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		<p>downstream, but no difference in water quality compliance status between the upstream and downstream site." ECF No. 95-3 at 8.</p> <p>Pharmaceuticals and personal care products were found in samples taken from the MS4. Maharg Decl., Ex. 29 (Emerick Expert Report), at p. 17. CSPA's Expert, Dr. Robert Emerick, concluded that the "most likely source of these bacterial indicators "is from the sanitary sewer system." <i>Id.</i> at p. 18-19. EPA and the Regional Board have both concluded that wastewater is commingling with stormwater at the Facility. Maharg Decl., Ex. 4 at MCSPMCSP32976; Ex. 22 at MCSP31320-21.</p>
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1	51. Under the Clean	Simpson Decl., at ¶	51. Disputed.
2	Water Act section	29.	The requirements of
3	303(d), states are		section 303(d) 33
4	required to identify		U.S.C. § 1313(d) are
5	waterbodies that do		questions of law, not
6	not meet, or are not		facts.
7	expected to meet,		
8	water quality		Disputed to the extent
9	standards (known as		the fact asserts that
10	"impaired		all water bodies that
11	waterbodies").		do not meet WQS are
12	Waterbodies in		placed on 303(d) list.
13	California that		The Small MS4 Permit
14	exceed protective WQS		acknowledges that a
15	are placed on the		water body may be
16	state's section		impaired and not
17	303(d) List.		listed on the 303(d)
18			list. ECF No. 95-7 at
19			12 (Small MS4 Permit
20			at 10, n.4).
21			
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26			
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29	52. Based on	Simpson Decl., at ¶¶	52. Undisputed.
30	California's Listing	29, 30.	
31	Policy in developing		
32	the 303(d) list, the		
33	Water Board evaluates		
34	water quality-related		
35	data and information.		
36			
37			
38			
39	53. There is no	Simpson Decl., at ¶	53. Undisputed
40	assessment data for	29.	but immaterial.
41	Mule Creek on the		
42	Water Board's 303(d)		There is extensive
43	List for 2020-2022,		data of sampling in
44	the current watershed		Mule Creek downstream
45	impairment list for		of the Facility
46	the area, but there		showing that Mule
47	is assessment data		Creek exceeds WQS for
48	for Dry Creek, which		<i>E. coli</i> and metals.
49	is the next waterbody		Maharg Decl., Ex. 1 at
50	receiving flows from		tbls. 4, 6, 9, 11; ECF
51	Mule Creek.		No. 95-3 at 5-40 (2021
52			Sources of Fecal
53			Pollution Report).
54			
55			
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1	54. The Water Board did not designate Dry Creek as impaired.	Simpson Decl., at ¶ 29.	54. Undisputed but immaterial.
2			
3	55. To support their claims regarding violations of the Small MS4 Permit, Plaintiffs relied on two categories of stormwater sampling data that correspond to before and after the filing of the first complaint on December 15, 2020:	Plaintiffs' MSA (ECF 45), at 28:18-26, 19:4-13; Declaration of Karen Ashby In Support Of Plaintiffs' Motion for Summary Adjudication (ECF 45-4, "Ashby Decl."), at ¶¶ 10, 11, tbls. 2, 3, ¶ 17, tbl. 8, ¶ 14, tbl. 5, ¶ 20, tbl. 10.	55. Disputed. The "Alleged Past Discharge Data Set" is not only data that is before the filing of the CSPA Complaint on December 15, 2020. ECF No. 1. The Alleged Past Discharge Data Set also included a sampling date after CSPA's Complaint was filed. Maharg Decl., Ex. 1 (Ashby Decl.) at 36-37, tbls. 5-6.
4	(1) purported "past" violations from samples collected between May 16, 2019 and December 17, 2020 (the "Alleged Past Discharge Data Set");		
5	and (2) purported "ongoing" violations from samples collected between January 27, 2021, to March 28, 2022 (the "Alleged Ongoing Discharge Data Set").		
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19	56. The stormwater sampling data from the Alleged Ongoing Discharge Data Set is comprised exclusively of samples collected at MCSP4, MCSP5, and MCSP6. None of the samples in this data set were collected from the two outfalls (MCSP2 and MCSP3) that are located near Mule Creek.	Ashby Decl. (ECF 45-4), at ¶¶ 17, 19-21, tbls. 8, 9, 10, 11.	56. Disputed. Two samples, dated December 17, 2020, were taken after CSPA filed its Complaint, and were collected at MCSP2 and MCSP3. Maharg Decl., Ex. 1 (Ashby Decl.) at 36-37, tbls. 5-6.
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1 2 3 4 5 6 7 8 9	57. During discovery, Plaintiffs and their experts conducted two "dry-weather" inspections of the Facility on March 9 and May 24, 2022, during which they collected samples from ponded water.	Lungren Decl., at ¶ 2; Declaration of Robert Emerick in Support of Plaintiffs' Motion for Summary Adjudication (ECF 45-2, "Emerick Decl."), at ¶ 17; Figure 6.	57. Disputed. CSPA disputes the characterization of where the samples were taken. Maharg Decl., Ex. 29, Figure 8 (monitoring locations). They were taken within the Facility's MS4. Maharg Decl., Ex. 1 at ¶ 24; Ex. 29 at 15. Otherwise, undisputed.
10 11 12	58. Plaintiffs did not conduct sampling near the LAA or from sample points MCSP2 and MCSP3.	Lungren Decl., at ¶ 3; Emerick Decl. (ECF 45-2), at ¶ 17; Figure 6.	58. Undisputed.
13 14 15	59. Pursuant to the Court's Scheduling Order, discovery closed on October 3, 2022.	Pretrial Scheduling Order (ECF 11), at 2:20-3:11.	59. Undisputed.
16 17 18 19 20 21 22 23 24 25 26 27 28	60. Disinfected effluent from the WWTP that is discharged to the LAAs via spray irrigation would be further treated as the effluent infiltrates through soil, where it receives additional physical, chemical, and biological treatment. The physical treatment is similar to water passing through a screen or sieve, where particulates are removed as the treated effluent	Simpson Decl., at ¶ 16.	60. Immaterial to CSPA's claims.

1	moves downward and		
2	laterally through the		
3	soil column. The		
4	chemical treatment is		
5	the result of cation		
6	exchange processes		
7	where contaminants		
8	are adsorbed onto		
9	soil particles and		
10	finally, the		
11	biological treatment		
12	is the result of		
13	microorganisms with		
14	the ability to		
15	degrade or transform		
16	both organic and		
17	inorganic substances		
18	in the infiltrating		
19	treated effluent. If		
20	the water comes into		
21	contact with		
22	groundwater, it would		
23	be diluted before it		
24	would reach Mule		
25	Creek.		
26	61. Plaintiffs did	Lungren Decl., at ¶	61. Undisputed.
27	not perform sampling	3;	
28	of the LAA during	Emerick Decl. (ECF	
	their two inspections	45-2), at ¶ 17;	
	of the Facility.	Figure 6.	
	62. In their	California	62. Disputed.
	complaints,	Sportfishing	
	Plaintiffs rely on	Protection Alliance	
	both the Alleged	Complaint for	
	Ongoing Discharge	Declaratory and	
	Data Set and the	Injunctive Relief	
	Alleged Past	(ECF 1, "CSPA's	
	Discharge Data Set	Complaint"), at ¶¶	
	that was collected	82, 97, 100, 101,	
	before the filing of	107, 111;	
	the first complaint.	County's FAC (ECF	
		35), at ¶¶ 82, 108-	
		109, 116-119.	
			CSPA relied only on
			samples that had
			been already been
			taken "in their
			complaint[]," since
			post-Complaint
			samples had not
			occurred. Yet both
			pre-Complaint and
			post-Complaint
			samples show that
			Defendants have
			violated the Small
			MS4 Permit, as
			alleged in CSPA's
			complaint. Maharg
			Decl., Ex. 1 at
			tbls. 2-6, 8-11.

1 2 3 4 5 6 7 8 9 10 11 12 13 14	63. A fundamental principle in evaluating stormwater sampling data is accounting for "background" and non-human sources in the levels detected.	Simpson Decl., at ¶ 17; Deposition Transcript of Elizabeth Lee, dated September 22, 2022 ("Lee Deposition"), Lungren Decl., Ex. C, at 200:19-201:9, 201:11-13;	63. Disputed. Evaluating stormwater sampling data is context-dependent. Here, in evaluating stormwater sampling data to determine whether Defendants' discharges from their MS4 to Mule Creek exceed WQS, the source of the pollutants are irrelevant to determining whether Defendants have complied with the Small MS4 Permit. Small MS4 Permit Provisions B.1, B.2, B.3, C, and, D (no requirements to account for background or non-human sources of pollutants).
15 16 17 18 19 20 21 22	64. The Bacteria Provisions, Section 2.b Natural Sources of Bacteria states that: "a natural source exclusion approach may be utilized after all anthropogenic sources of bacteria are identified, quantified, and controlled."	Part 3 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California, Bacteria Provisions and a Water Quality Standards Variance Policy ("Bacteria Provisions"), RJN, Ex. D, Section 2.b, at p. 5.	64. Undisputed but immaterial.
23 24 25 26 27 28	65. Per EPA guidance, a violation of bacteria standards during dry weather flow does not always mean that an illicit discharge or sewage overflow is present. While raw sewage has bacteria	October 2004 EPA Guidance Manual: Illicit Discharge Detection and Elimination ("EPA Guidance Manual"), RJN, Ex. G, at p. 142.	65. Undisputed but immaterial.

1	concentrations that		
2	greatly exceed		
3	bacteria standards		
4	(approximately 12,000		
5	MPN/100 mL) other		
6	bacteria sources,		
7	such as urban		
8	wildlife, can also		
9	cause a stream to		
10	violate standards		
11	66. During discovery,	Lee Deposition,	66. Undisputed
12	the head of the	Lungren Decl., Ex. C,	but immaterial.
13	Regional Water	at 138:12-19; 200:19-	
14	Board's MS4 permit	201:9; 201:11-13.	The interpretation of
15	compliance unit,		an NPDES permit is a
16	Elizabeth Lee, was		question of law. <i>NRDC</i>
17	deposed by		<i>v. Cnty of Los</i>
18	Plaintiffs. In		<i>Angeles</i> , 725 F.3d
19	speaking about the		1194, 1204 (9th Cir.
20	importance of		2013).
21	background, Ms. Lee		
22	testified that:		
23	Q: So evaluating MCSP		
24	4 would not be		
25	enough, you would		
26	also want to take		
27	into account what's		
28	happening upstream of		
	the facility. Is		
	that fair to say?		
	A. . . That's correct.		
	Q. And why is that?		
	A. . . Well, again		
	like I said, you		
	don't know if - if		
	you only have that		
	one downstream data		
	point, if the		
	discharges from MCSP		
	had, in fact,		
	contributed to that		
	or caused it without		
	knowing what the		
	condition and the		
	receiving water		

1	upstream of MCSP was		
2	to begin with.		
3	Q. . . Right. Is that		
4	typically referred to		
5	as what the		
6	background is?		
7	A. . . Yeah, I guess		
8	that's what you would		
9	call it.		
10	Q: And is that true		
11	for metals as well as		
12	E. coli?		
13	A. . . Correct.		
14	67. The 2020	2020 Collection	67. Undisputed
15	Collection System	System Investigation	as to the
16	Investigation Report	Report, Lungren	reports'
17	concluded that	Decl., Ex. B, at	conclusions.
18	detections in	4.3.1.6.	
19	stormwater of		Disputed to the
20	aluminum, iron, and		extent the fact
21	magnesium are likely		asserts that
22	naturally occurring		natural-occurring
23	from the area's		metals are the sole
24	lithology and that		source of metals
25	detections of		exceedances found in
26	magnesium are		the Facility's
27	attributable to		stormwater
28	sources upstream of		discharges.
	the Facility.		Defendants have
			identified several
			"hot spots" at the
			Facility that
			contribute metals to
			stormwater
			discharges,
			including the firing
			range, the metal
			fabrication area,
			parking lots and
			outdoor storage
			areas associated
			with vehicle
			maintenance, the
			recycling yard, and
			the vocational
			welding area. Maharg
			Decl., Ex. 28 (MCSP
			Storm Water Master
			Plan) at MCSP2069-
			2081. The Regional
			Board has also
			identified the

		Facility as the source of metals in stormwater discharges. Maharg Decl., Ex. 22 at MCSP31321.
68. The 2020 Collection System Investigation Report concluded that zinc detections are likely attributed to galvanized metal at the Facility, such as fencing.	2020 Collection System Investigation Report, Lungren Decl., Ex. B, at 4.3.1.6.	68. Undisputed.
69. The Small MS4 Permit's Discharge Prohibitions, Provision B.1, prohibits the "[d]ischarges of "waste" from the MS4 that are prohibited by Statewide Water Quality Control Plans or applicable Regional Water Quality Control Plans (Basin Plans)."	Small MS4 Permit, RJN, Ex. A, Provision B.1, at p. 18.	69. Undisputed. The interpretation of an NPDES permit is a question of law. <i>NRDC v. Cnty of Los Angeles</i> , 725 F.3d 1194, 1204 (9th Cir. 2013).
70. The Water Quality Control Plan for the California Regional Water Quality Control Board, Central Valley Region (February 2019) (the "Basin Plan") prohibits the discharge of several forms of waste in specified waterbodies.	California Regional Water Quality Control Board, Central Valley Region Water Quality Control Plan (Fifth Edition) for the Sacramento River and San Joaquin River Basins ("Basin Plan"), RJN, Ex. C.	70. Undisputed. Disputed to the extent that the fact asserts that the Basin Plan only prohibits discharges of waste into specified waterbodies. The Basin Plan in its entirety establishes the standards that govern water quality of receiving waters and discharges thereto. See ECF No. 95-7 at 560. Unless

1			otherwise permitted, discharges that exceed water quality standards established by the Basin Plan are prohibited by the Basin Plan. See ECF No. 95-7 at 545-1006.
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6	71. The Basin Plan includes thirteen	Basin Plan, RJN, Ex. C, at pp. 110-112, 114.	71. Undisputed.
7	(13) amendments that were added to		Disputed to the extent that the fact asserts that the
8	prohibit waste discharges as follows: (1)		Basin Plan only prohibits discharges of waste through
9	amendments 2-12 to		these 13 amendments. The Basin Plan in its entirety
10	prohibit waste discharge from		establishes the standards that govern water quality of receiving waters
11	"leaching and percolation systems" within certain areas		and discharges thereto. See ECF No. 95-7 at 560. Unless
12	(pp. 110-112); and		otherwise permitted, discharges that exceed water quality standards
13	(2) amendments 24 and 28 to prohibit waste		established by the Basin Plan are prohibited by the
14	discharge "from Individual Disposal Systems" in certain		Basin Plan. See ECF No. 95-7 at 545-1006.
15	areas (p. 114).		
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20	72. The Small MS4 Permit's Discharge Prohibitions,	Small MS4 Permit, RJN, Ex. A, Provision B.2, at p. 19.	72. Undisputed.
21	Provision B.2, provides that		The interpretation of an NPDES permit is a question of law. <i>NRDC v. Cnty of Los Angeles</i> , 725 F.3d 1194, 1204 (9th Cir. 2013).
22	"[d]ischarges of storm water from the MS4 to waters of the U.S. in a manner		
23	causing or threatening to cause a condition of		
24	pollution or nuisance as defined in Water		
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1	Code § 13050 are prohibited."		
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3	73. Mule Creek has not been listed as an impaired waterbody in the Section 303(d) listing process.	Simpson Decl., at ¶ 29.	73. Undisputed but immaterial.
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6	74. That listing process is specifically based on whether the waterbody's beneficial uses have been impaired.	Simpson Decl., at ¶ 29.	74. Undisputed.
7			Disputed to the extent the fact asserts that all water bodies that do not meet WQS are placed on 303(d) list. The Small MS4 Permit acknowledges that a water body may be impaired and not listed on the 303(d) list. ECF No. 95-7 at 12 (Small MS4 Permit at 10, n.4).
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16	75. Plaintiffs did not establish that the stormwater discharges at issue actually reached Mule Creek such that it caused a "condition of pollution or nuisance" or that the stormwater that was sampled from locations MCSP5 and MCSP6 reached Mule Creek.	Order on Plaintiffs' Motion for Summary Adjudication (ECF 60), at 21:5-12 (denying the MSA on this ground).	75. Disputed.
17			The asserted fact mischaracterizes the Court's Order on Plaintiffs' Motion for Partial Summary Judgment. The Court found:
18			"Therefore, because there appears to be a dispute of material fact as to whether the discharges upon which plaintiffs rely reached Mule Creek, the court cannot at this time conclude that defendants' discharges entered "waters of the U.S." or "caus[ed] or
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1			threaten[ed] to cause a condition of pollution or nuisance" therein. (See Small MS4 Permit § B.2.) Accordingly, summary judgment on the issue of whether defendants violated provision B.2 of the Small MS4 Permit will be denied." ECF No. 60 at 21:5-12.
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9	76. The Small MS4 Permit's Discharge Prohibitions, Provision B.3 ("MS4 Provision B.3"), provides in pertinent part that discharges of material "other than storm water to waters of the U.S. shall be effectively prohibited, except as allowed under this Provision."	Small MS4 Permit, RJN, Ex. A, Provision B.3, at p. 19.	76. Undisputed. The interpretation of an NPDES permit is a question of law. <i>NRDC v. Cnty of Los Angeles</i> , 725 F.3d 1194, 1204 (9th Cir. 2013).
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17	77. Plaintiffs' experts collected stormwater samples from ponded water sampled it for the presence of pharmaceuticals and caffeine.	Emerick Decl. (ECF 45-2), at ¶ 17; Figure 6.	77. Undisputed. CSPA disputes the characterization of where the samples were taken. See Maharg Decl., Ex. 29, Figure 8 (monitoring locations). They were taken within the Facility's MS4. Maharg Decl., Ex. 1 at ¶ 24; Ex. 29 at 15. Otherwise, undisputed.
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26	78. The sampling, however, was conducted during dry weather and not	Lungren Decl., at ¶ 2;	78. Undisputed.
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1	during a Significant Rain Event.	Emerick Decl. (ECF 45-2), at ¶ 17; Figure 6.	
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3	79. Ms. Lee further testified that the term "effectively" as used in Provision B.3 is not an absolute discharge prohibition and, instead, it means that the permittee must use best efforts to prevent non-stormwater from discharging through the MS4 and engage with the Board in the iterative process to implement BMPs.	Lee Deposition, Lungren Decl., Ex. C, at 184:20-185:2.	79. Disputed. Defendants' characterization of Ms. Lee's testimony is not accurate. She states: "Sure, based on my opinion, effectively prohibited would be if you knew that something other than non-storm water was making its way into your system, that you would try to prohibit it or implement BMPs to prohibit it. Whether it be through public education or something more structural, in effect, to stop it from entering your system." Lee Deposition at 184:20-185:2. Neither Ms. Lee nor Provision B.3 mention the iterative process.
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23	80. CSPA's expert, Dr. Robert Emerick, admitted at his deposition that he did not know and that he could not determine how much sewage was present in	Emerick Deposition, Lungren Decl., Ex. D, at 56:24-57:1, 92:11-12.	80. Undisputed.
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1	the stormwater at the		
2	Facility.		
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5	81. High levels of	Simpson Decl., at ¶	81. Disputed.
6	ammonia would be	32;	
7	detected in the	Lee Deposition,	Dr. Emerick
8	stormwater samples if	Lungren Decl., Ex. C,	testified that while
9	sewage was present,	at 136:3-13, 136:14-	ammonia can be a
10	but the levels of	25, 137:18-138:2,	good indicator of
11	ammonia detected in	138:3-11;	the presence of
12	the Alleged Ongoing	Emerick Deposition,	sewage, it is not a
13	Discharge Data Set	Lungren Decl., Ex. D,	perfect indicator.
14	are very low.	at 55:21-24, 57:7-8.	Maharg Decl., Ex. 30
15			(Emerick Tr.), at
16			pp. 55-63.
17			
18			The first problem
19			Dr. Emerick
20			identifies with
21			using ammonia to
22			detect the presence
23			of sewage in storm
24			water is the
25			detection limit.
26			Dr. Emerick
27			testified that
28			adding sewage to
			storm water dilutes
			the amount of
			ammonia in the
			sewage to a point
			where it might be
			below the detection
			limit. Maharg Decl.,
			Ex. 30 (Emerick
			Tr.), at pp. 55-63.
			The second issue
			that Dr. Emerick
			identifies is that
			ammonia may be
			converted to nitrate
			in transit from the
			source and where the
			sample is collected,
			and therefore is not
			a reliable indicator
			in some cases (e.g.,
			where the sewage
			component goes

		through a low-oxygen environment such as groundwater or soil). Maharg Decl., Ex. 30 (Emerick Tr.), at pp. 55-63.
82. Plaintiffs' expert, Dr. Emerick, admitted at his deposition that he reviewed the ammonia levels in the sampling data and found them to be below levels expected if they contained sewage. He further testified that that he observed potential sources of background contributions to the E. Coli detections.	Emerick Deposition, Lungren Decl., Ex. D, at 43:22-44:3, 44:22-45:6, 56:24-57:1, 92:11-12; 71:5-7.	82. Disputed. Dr. Emerick actually testified that ammonia was an unreliable indicator for cases such as this, where the sewage component would be diluted by the volume of storm water with which it was mixed. Maharg Decl., Ex. 30 (Emerick Tr.), at pp. 55-63. Dr. Emerick further testified that it was possible to find very low levels of ammonia, or none at all if the ammonia had been diluted below the detection limit, in contexts such as this where storm water had sufficiently diluted the sewage component. Maharg Decl., Ex. 30 (Emerick Tr.), at pp. 55-63.
83. Ms. Lee testified that, based upon her extensive experience and training at the Regional Water Board, she would expect ammonia levels in stormwater samples to be "in the hundreds" if there was sewage present.	Lee Deposition, Lungren Decl., Ex. C, at 138:3-11.	83. Disputed. Ms. Lee actually testified that she would expect ammonia to be much higher if she were "looking at a wastewater type overflow or discharge into the storm water system" (emphasis added), not, as Defendants

1			state, "in storm water samples." Lee Deposition at 138:3-11. This is consistent with Dr. Emerick's testimony that raw sewage would be expected to have high levels of ammonia, but diluted sewage would have lower levels of ammonia. Maharg Decl., Ex. 30 (Emerick Tr.), at pp. 55-63.
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9	84. The Small MS4 Permit's "Effluent Limitations" Provision C ("MS4 Provision C"), provides in pertinent part that: (1)	Small MS4 Permit, RJN, Ex. A, Provision C, at p. 20.	84. Undisputed but immaterial to CSPA's claims.
10	permittees shall implement controls to reduce pollutants from their MS4s to WOTUS to the MEP standard; and (2) stormwater discharges shall not contain hazardous substances above "reportable quantities."		
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20	85. CDCR is actively engaged in the iterative BMP process with the Regional Water Board and the head of the Board's MS4 permit compliance program is satisfied with CDCR's progress.	Lee Deposition, Lungren Decl., Ex. C, at 97:25-98:4, 99:22-101:10, 165:23-166:4, 198:15-199:9.	85. Disputed and immaterial. Ms. Lee testified only to her partial satisfaction with regard to a specific set of BMPs, and further testified that, though she could not recall which ones specifically, that there were BMPs that had not been implemented to her satisfaction in the past.
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		<p>Lee Deposition at 198:15-199:1.</p> <p>On November 3, 2022, the Regional Board, through a letter signed by Ms. Lee, notified Defendants that they had not implemented BMPs sufficient to address metals that are causing or contributing to WQS exceedances in Mule Creek. Maharg Decl., Ex. 21.</p>
<p>86. The Small MS4 Permit's Receiving Water Limitations, Provision D, provides: "Discharges shall not cause or contribute to an exceedance of water quality standards contained in a Statewide Water Quality Control Plan, the California Toxics Rule (CTR), or in the applicable Regional Water Board Basin Plan."</p>	<p>Small MS4 Permit, RJN, Ex. A, Provision D, at p. 20.</p>	<p>86. Undisputed. The interpretation of an NPDES permit is a question of law. <i>NRDC v. Cnty of Los Angeles</i>, 725 F.3d 1194, 1204 (9th Cir. 2013).</p>

1	87. Provision D	Small MS4 Permit,	87. Undisputed.
2	provides, in relevant	RJN, Ex. A, Provision	The interpretation of
3	part: Upon a	D.1, at p. 20.	an NPDES permit is a
4	determination by		question of law. <i>NRDC</i>
5	either the Permittee		<i>v. Cnty of Los</i>
6	or the Regional Water		<i>Angeles</i> , 725 F.3d
7	Board that MS4		1194, 1204 (9th Cir.
8	discharges are		2013).
9	causing or		
10	contributing to an		
11	exceedance of an		
12	applicable water		
13	quality standard, the		
14	Permittee shall		
15	promptly notify and		
16	thereafter submit a		
17	report to the		
18	Regional Water Board		
19	that describes BMPs		
20	that are currently		
21	being implemented and		
22	additional BMPs that		
23	will be implemented		
24	to prevent or reduce		
25	any pollutants that		
26	are causing or		
27	contributing to the		
28	exceedance of water		
	quality standards.		
18	88. Plaintiffs do not	Simpson Decl., at ¶¶	88. Disputed.
19	have sufficient data	30-31.	Object to the extent
20	from the Alleged		this asserted fact
21	Ongoing Discharge		is a conclusion of
22	Data Set to prove		law regarding
23	that Mule Creek's		Defendants'
24	water quality		compliance with the
25	standards were		Small MS4 Permit.
26	exceeded after the		
27	filing of the first		Sampling data from
28	complaint.		December 17, 2020,
			collected two days
			after CSPA filed its
			complaint, at MCSP2
			and MCSP3 - which
			are undisputed
			points of discharge
			into Mule Creek -
			indicated
			exceedances of

1		aluminum, iron, lead, and zinc, Maharg Decl., Ex 1 (Ashby Decl.) at 36- 37 (tbls. 5-6), which violate the Discharge Prohibitions and the Receiving Water Limitations.
2		Plaintiffs have also provided evidence of past discharges from MCSP2 and MCSP3, which Defendants concede discharge to Mule Creek, that demonstrate numerous past violations of the Small MS4 Permit. Maharg Decl., Ex 1 (Ashby Decl., ¶¶ 17-21, tbls. 7-11.
3		Defendants moved their sampling locations upstream to MCSP5 and MCSP6, but made no improvements to the conveyances between MCSP5 and MCSP2 or between MCSP6 and MCSP3.
4		Defendants have reported discharges to Mule Creek, as recently as November 2, 2022. Maharg Decl., Ex. 20; see also Exs. 8-19 (Discharge Notifications). Sampling from these events shwos that Defendants' MS4 discharges exceeded <i>E. coli</i> and metals WQS. Maharg Decl., Ex. 1 at tbls. 8-11.
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27	89. Determining whether a given	Simpson Decl., at ¶¶ 17, 30-31; 89. Disputed.
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1 2 3 4 5 6 7 8 9	waterbody's Receiving Water Limitations have been exceeded depends on assessing a robust data set from the waterbody itself, not on whether a handful of samples are above criteria from a single sampling point (i.e., from MCSP4) after taking into consideration of background sources.	Lee Deposition, Lungren Decl., Ex. C, at 120:9-121:10, 169:20-170:4, 170:6-22, 199:22-200:18.	Defendants' assertion is not a fact, but a legal argument. The evidence establishes that Mule Creek was exceeding E. coli and WQS on days where Defendants discharged stormwater above those same standards. Maharg Decl., Ex 1 at tbls. 4, 6, 9, 11.
10 11 12 13 14 15 16 17 18 19 20 21 22	90. Provision D provides that: (1) the Permittee complies with the Receiving Water Limitations "through timely implementation of control measures/BMPs and other actions to reduce pollutants" and that the Permittee complies with the Receiving Water Limitations by complying with certain specific procedures.	Small MS4 Permit, RJN, Ex. A, Provision D, at p. 20.	90. Disputed. The interpretation of an NPDES permit is a question of law. <i>NRDC v. Cnty of Los Angeles</i> , 725 F.3d 1194, 1204 (9th Cir. 2013). Through paraphrasing and selective quotations, Defendants have mischaracterized Provision D of the Small MS4 Permit. Provision D does not include a "safe harbor" from enforcement. See ECF No. 95-7 at 22, 422
23 24 25 26 27 28	91. CDCR has implemented extensive BMPs and is engaged in the BMP iterative process with the Regional Water Board.	Orta Decl., at ¶¶ 4-13; Simpson Decl., at ¶ 15.	91. Disputed and immaterial. Defendants' assertion is not a fact, but a legal interpretation of the Small MS4 Permit. The interpretation of an NPDES permit is a

1		question of law. <i>NRDC v. Cnty of Los Angeles</i> , 725 F.3d 1194, 1204 (9th Cir. 2013).
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5		Disputed that CDCR has improved the quality of the Facility's stormwater discharges. Maharg Decl., Ex. 1 at Tbls. 2-6, 8-1.
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9		The majority of the BMPs in place at the Facility were in place for years. Maharg Decl., Ex. 2 (Orta Tr.) at 97:19-24, 112:17-24, 107:18-24, 107:25-108:9, 110:6-16; ECF No. 95-4 at 19.
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14		Defendants have not fixed defects in their sanitary sewer system and MS4 that were identified in 2019. Maharg Decl., Ex. 2 (Orta Tr.) at 114:6-13; Maharg Decl., Ex. 20 at MCSP31322; Ex. 26.
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20		Defendants have admitted to continuing unlawful discharges of irrigation waters and conceded that the Facility would not come into compliance with Provision B.3 with regard to their irrigation discharges, until February 2025. ECF No. 95-4 (Orta Decl.) at 19; Maharg Decl., Ex. 23 at MCSP33473; Maharg Decl., Ex. 7 at MCSP32215-16.
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		On November 3, 2022, the Regional Board notified Defendants they have not complied with orders to address discharges that cause or contribute to exceedances of metals in Mule Creek. Maharg Decl., Ex. 21.
92. In its MSA, the County relied on photographs from its inspection of the Facility and ensuing declaration from its expert, Karen Ashby, asserting that certain industrial materials were uncovered and exposed to potential precipitation.	Plaintiffs' MSA (ECF 45), at 37:5-14, 23-26; Ashby Decl. (ECF 45-4), at ¶¶ 22, 26-27; IMG-2885; IMG-2884; IMG-2876- IMG-2877.	92. Undisputed. Immaterial to CSPA's claims.
93. CDCR has continuously held a valid NEC, certifying that its industrial activities and materials are not exposed to precipitation.	State Water Resources Control Board Receipts of No Exposure Certification (NEC) Under the Industrial General Permit, first processed May 22, 2018 (Receipt of NEC Under the Industrial General Permit, dated July 27, 2018; Receipt of NEC Under the Industrial General Permit, dated July 5, 2019; Receipt of NEC Under the Industrial General Permit, dated July 3, 2020; Receipt of NEC Under the Industrial General Permit, dated September 23, 2021; Receipt of NEC Under	93. Undisputed. Immaterial to CSPA's claims.

	the Industrial General Permit, dated September 27, 2022) ("NEC Certification Receipts"), RJN, Ex. J.	
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Dated: December 12, 2022

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